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FILED
NOV 17 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-672

In The

Supreme Court of the United States

October Term, 1998

AMERICAN BLIND & WALLPAPER FACTORY, INC.,

Petitioner,

vs.

ALVORD-POLK, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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22 pp

QUESTIONS PRESENTED

The United States Court of Appeals for the Third Circuit's Decision in this case was reached in an accepted and usual course of judicial proceedings as was the decision of the lower court such that there is no call for an exercise of this Court's supervisory power. The questions presented are:

> Whether the Petitioner ever requested an opportunity to present evidence at a hearing at the District Court level, or rather did the Petitioner rely on the written record it had previously submitted, and in fact oppose the presentation of testimonial evidence by the other plaintiffs.
>
> Whether the Petitioner waived its right to present testimony when it never requested to do so at the District Court level.
>
> Whether the consideration of any evidence was required in order to determine if the Petitioner was bound by the Settlement Agreement, and whether the evidence presented by the Petitioner was in fact considered by the District Court and considered to raise no genuine issue of material fact.
>
> Whether the Decision of the Court of Appeals is inconsistent with its prior decisions or the decisions of other circuits.

The Third Circuit's resolution of the above issues was proper and was consistent with its own decisions as well as with decisions in other circuits.

RULE 29.6 STATEMENT

Pursuant to Supreme Court rule 29.6, Respondents declare that none of them have any parent companies or any subsidiaries.

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STATEMENT OF THE CASE

A. The Plaintiffs' Agreement

Prior to instituting an antitrust suit against F. Schumacher & Co. ("Schumacher") and the National Decorating Products Association ("NDPA"), all of the plaintiffs entered into an agreement, namely the "Wallpaper Industry Litigation Committee Agreement" (the "Agreement") on May 24, 1990. CA App. 708-726. The Agreement delineated how the group would manage, direct and fund the litigation, act on settlement offers and make other decisions concerning the litigation. CA App. 708-726. It is this Agreement which the courts below were called on to interpret.

The Agreement provided that, although the businesses of the plaintiffs varied considerably in their annual gross sales, the plaintiffs nevertheless would fund the litigation on an equal basis with an initial contribution of $25,000 each, along with a promise to pay in the future equal shares of the expenses of the litigation and equal shares of the legal fees on an on-going basis. CA App. 708-726, ¶¶ 3 and 7. Concomitant therewith was a provision in the Agreement that provided for an equal distribution of any group settlement. CA App. 708-726, ¶ 12. However, at trial, each plaintiff was required to prove, and recover, its own damages. CA App. 708-726, ¶ 9.

Decisions with regard to the litigation were to be made by a majority vote of the members. CA App. 708-726, ¶ 5. However, any modifications to the terms of the Agreement required unanimous consent. CA App.

708-726, ¶ 16. Although Paragraph 5 required advance notice of voting, no time period was specified.

In the event a settlement proposal were tendered to the group as a whole, the Agreement required the group to vote on the proposal using the majority vote provision of Paragraph 5. CA App. 708-726, ¶ 11. The Agreement did not prevent any plaintiff from negotiating its own settlement with any defendant. CA App. 708-726, ¶ 10.

The Agreement also provided for a mechanism for leaving the committee. CA App. 708-726, ¶ 6. That could occur if a party entered into a settlement with all the defendants, ¶ 10, or if it chose to "withdraw as a litigant". ¶ 6. The central issue determined by the courts below was the meaning of the term "withdraw as a litigant".

B. Petitioner's Purported Withdrawal from the Group

Petitioner asserts that on July 17, 1995, it "withdrew from the litigation for purposes of settlement only." In fact, however, on July 17, 1995, Petitioner wrote to the plaintiffs' law firm ("Kohn firm") that it had "elected to withdraw as a litigant and member of the Committee" unless Paragraphs 11 and 12 of the Agreement were amended. Neither the letter nor the Agreement says anything about withdrawing "for purposes of settlement only." CA App. 277-278.

Thereafter, although the Agreement was not amended, Petitioner continued in the case as a plaintiff and as a member of the Committee. Indeed, in September

1995, Petitioner participated in a Committee vote concerning group settlement procedures. CA App. 280. Petitioner conceded that the two-group settlement procedure did not amend the Agreement. CA App. 240. Thus, on July 17, 1995, Petitioner merely threatened to "withdraw as a litigant and member of the Committee," and then did not act on the threat.

From late April 1996 until late June, 1996, a trial was held in this case in which Petitioner participated as a plaintiff. CA App. 590. Because the jury hung and was unable to reach a verdict, a mistrial was declared. CA App. 590. On June 11, 1996, during the course of the trial, all parties including Petitioner participated in a settlement conference before Judge Huyett. CA App. 054, 242.

Thereafter, on July 29, 1996, an all-day settlement conference was held before Magistrate Judge Leomporra. CA App. 590.

On August 7, 1996, Petitioner's individual counsel Fox, Rothschild wrote to the Kohn firm asserting that if certain events occurred, Petitioner "may simply 'opt out' pursuant to Paragraph 6 [of the Litigation Agreement]." CA App. 753-754. Petitioner did not assert on August 7, 1996 that it had previously, on July 17, 1995 "withdrawn as a litigant for settlement purposes only." Instead, on August 7, 1996, Petitioner stated that it might "opt out" in the future.

The next letter sent by Petitioner's counsel, on August 23, 1996, similarly does not state that Petitioner had "withdrawn for purposes of settlement only." Instead, the letter states that Petitioner has "withdrawn from the plaintiff group effective immediately." CA App.

318-320. Notwithstanding this assertion, Petitioner continued as a plaintiff in the case, representing to Magistrate Leomporra on December 17, 1996 and to Judge O'Neill on February 13, 1997 that it was still a plaintiff and still represented by the Kohn firm. CA App. 672, 771, 775.

It was not until after August 23, 1996 that Petitioner first asserted the position that it had allegedly "withdrawn for the purposes of settlement only." CA App. 326. Contrary to Petitioner's suggestion, the other eight plaintiffs clearly did not acquiesce in this position. On the contrary, the first document even mentioning Petitioner's position that it had "withdrawn for purposes of settlement only" is a September 4, 1996 letter from the Kohn firm to Petitioner's separate counsel. That same letter states clearly that "Petitioner understands that all other plaintiffs reserve any and all rights." CA App. 326. Thus, far from agreeing that Petitioner had "withdrawn for purposes of settlement only", the other plaintiffs expressly reserved all rights.

C. The Vote on the Settlement Proposal

On August 20, 1996, Magistrate Judge Leomporra notified the parties that he had scheduled a settlement conference for August 29, 1996. CA App. 322.

On August 22, 1996, Schumacher tendered a written group settlement offer to the Kohn firm. CA App. 308-310. On that same day, Harold Kohn forwarded the offer to all plaintiffs indicating that a vote was now appropriate under the Agreement and putting all plaintiffs on notice that a meeting among plaintiffs, including

a vote on the settlement offer, was scheduled for August 26, 1996. CA App. 312-313. The short notice period was required because of the impending settlement conference. CA App. 322.

On August 23, 1996, Petitioner wrote to Mr. Kohn, complained about the short notice period and demanded that the meeting and voting be canceled unless certain conditions were met. CA App. 318-320. Meanwhile, the settlement conference was postponed until September 24, 1996 because of unavailability of counsel. CA App. 322, 103.

On September 24, 1996, principals and attorneys of all plaintiffs and of Schumacher attended a settlement conference before Magistrate Judge Leomporra. CA App. 253-254. After extensive settlement discussions, including private discussions between Petitioner and Schumacher in front of Magistrate Judge Leomporra, Petitioner and Schumacher were not able to reach a settlement. CA App. 254, 469-470. The reason for the impasse was that Petitioner continued to refuse to settle unless it could sell all of Schumacher's product lines and Schumacher refused to agree to that. CA App. 469-470. Petitioner has never wavered from its position that it will settle only if it is authorized by Schumacher to sell all of its lines, including the high-end lines. CA App. 209, 243 (¶ 8), 296-297, 338-340, 496-497. In fact, Petitioner has repeatedly acknowledged that it was not interested in a monetary settlement and that it would give up any monetary settlement in order to obtain access to all of Schumacher's product lines. CA App. 209. Schumacher has never wavered from its position that it would not authorize its 1-800 dealers to sell its high-end product lines through

their 1-800 accounts. CA App. 242-243, ¶¶ 20-21; 247-248, ¶ 33; 250-251, ¶ 42.

Thereafter, all plaintiffs met with Magistrate Judge Leomporra privately, at which time some of the plaintiffs called for a vote on the Schumacher proposal. CA App. 255. Petitioner refused to participate in the vote and left the room. CA App. 255. The other plaintiffs voted unanimously to accept the Schumacher proposal. CA App. 256.

The formal Settlement Agreement was executed by Schumacher and all of the plaintiffs except Petitioner as of November 18, 1996. CA App. 595-634.

ARGUMENT

I. THE COURTS BELOW CORRECTLY CONCLUDED THAT THE AGREEMENT IS CLEAR ON ITS FACE, AND THAT "WITHDRAW AS A LITIGANT" IS CAPABLE OF ONLY ONE MEANING, NAMELY, TO WITHDRAW COMPLETELY FROM THE LITIGATION.

On May 24, 1990, plaintiffs entered into an Agreement among themselves which described how they would manage, direct, and fund their antitrust litigation. CA App. 708-726. As set forth above, they agreed to divide the costs and the settlement proceeds equally. Each was responsible for proving its own damages at trial. Decisions would be made by a majority vote. The relevant provisions of the Agreement are as follows:

> 5. From time to time during the course of the Litigation, the Committee will be asked to make decisions regarding the governance

of the Litigation. Such decisions shall be made by a majority vote of the representatives of all of the Committee members, and shall be final, conclusive and binding on all members of the Committee. All members of the Committee will be given advance notice of any votes. . . .

6. Any member of the Committee may choose to withdraw as a litigant, and leave the Committee, at any time. The monies contributed, whether in the form of cash or irrevocable letter of credit, however, are not refundable and will not be returned unless authorized by a majority vote of the remaining Committee members.

* * *

10. Each signatory is free to enter into separate settlement agreements with one or more of the defendants. When a signatory settles separately with all defendants, that settlement shall be deemed a withdrawal within the meaning of Paragraph 6 of this Agreement.

11. Where a settlement proposal is tendered by one or more defendants to all signatories as a group, the group shall vote on that proposal using the procedure set forth in Paragraph 5 of this Agreement.

* * *

16. This Agreement shall not be amended or modified except by a written amendment executed by a duly authorized representative of each of the signatories. . . .
CA App. 708-726.

The simple question the courts below were asked to decide was the interpretation of the term in the Agreement, "withdraw as a litigant". Petitioner contended with

a complete absence of sound reasoning that it meant to withdraw from the group for the purpose of pursuing a separate settlement. The settling plaintiffs contended that it meant what it said, to withdraw as a litigant, and the courts below agreed.

In this particular case, the term "withdraw as a litigant" is capable of one and only one meaning. As the District Court correctly noted, a litigant is "a party to a lawsuit; one engaged in litigation. . . . " Black's Law Dictionary (rev. 4th ed.). The District Court correctly analyzed the crucial Paragraph as follows:

> [P]aragraph 6 does not authorize withdrawal from the committee for a limited purpose, but rather allows a signatory to "withdraw as a litigant, and leave the committee, at any time" and thus permits signatories to withdraw from the committee *only when also withdrawing from the litigation*. ABWF remains engaged in this litigation and thus has not withdrawn as a litigant. Therefore, ABWF has not withdrawn within the meaning of paragraph 6.
>
> Petitioner's App. 24a (footnotes omitted)(emphasis added).

II. THE COURTS BELOW CORRECTLY CONCLUDED THAT PETITIONER'S EVIDENCE, EVEN IF CONSIDERED, IS NOT PERSUASIVE WITH REGARD TO ANY ISSUE RAISED BY PETITIONER.

Petitioner claims in the alternative in its Petition that the substantial evidence submitted by it was not considered by the District Court. This statement is patently incorrect. The District Court alternatively considered

Petitioner's evidence but ruled that it raised no genuine issue of material fact. The Court's decision in this regard is consistent with summary judgment standards, which require the non-moving party to come forward with evidence which shows the existence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In fact, the District Court considered Petitioner's evidence in a light most favorable to Petitioner because the settling plaintiffs had not had the opportunity to present evidence to refute that of Petitioner, with the exception of Ms. Resnick's opt-out letter of August 7, 1996, which was submitted to Magistrate Judge Leomporra at the hearing on December 23, 1996. CA App. 657-689. The Memorandum and Order of the District Court notes:

> The exhibits offered by ABWF, even if considered, reveal only ABWF's unilateral attempts to withdraw from a binding group settlement vote while remaining in the litigation and to revoke the committee's counsel's authority to negotiate on behalf of the full committee. The unambiguous language of the agreement forecloses such actions. The exhibits do not reveal any other party's acquiescence in ABWF's position but reveal only that the committee continued to seek ABWF's involvement in group settlement efforts without prejudice either to ABWF's position or to the other plaintiffs' rights under the Agreement. *See* Ex. 2Q.
>
> Petitioner's App. 27a, footnote 8.

Petitioner's claim that the lower courts refused to consider Petitioner's evidence regarding lack of notice is simply untrue. The District Court notes, "[t]he exhibits

also reveal that Petitioner was notified a vote was imminent and was present when the vote was called." Petitioner's App. 27a, footnote 8. See also Section III of the Opinion of the Court of Appeals, Petitioner's App. 11a.

III. NO EVIDENTIARY HEARING WAS REQUIRED.

Petitioner argues that an evidentiary hearing was required pursuant to the holdings in *Tiernan v. Devoe*, 923 F.2d 1024 (3d Cir. 1991) and *Garabedian v. All State Engineering Company*, 811 F.2d 802 (3d Cir. 1987).

The issue in *Garabedian*, supra, was whether a client had authorized his attorney to settle his case on the terms set forth in a proposed Settlement Agreement. Affidavits were submitted by the parties, and the Court resolved the dispute without holding a hearing, relying solely on the Affidavits and Memoranda. The Court of Appeals stated that when relief from a Judgment hinges upon a factual issue, and credibility determinations are involved, a hearing should be held to determine entitlement to relief. Since the Affidavits of the client and his attorney demonstrated the existence of a genuine dispute of material fact, the Court should have held a hearing. In the instant case, there is no genuine dispute of material fact. The only issue is whether or not the terms of the Litigation Agreement are ambiguous. Both Courts below found that the terms of the Litigation Agreement were not ambiguous and there was no genuine dispute of material fact.

The *Tiernan* opinion, supra, cites *Garabedian*, supra. In *Tiernan*, there were disputed factual issues concerning an attorney's authority to enter into settlements on behalf of his clients, whether those clients had actually ratified the

settlements and whether those clients were equitably estopped from challenging the validity of the settlements. It was for those reasons that the Summary Judgment entered by the District Court was reversed. Again, in the instant case, there are no genuine issues of material facts.

Both *Tiernan* and *Garabedian* stand for the proposition that an attorney cannot settle a claim without the authority of his client. They are inapplicable here. The issue in the instant case is not whether Petitioner did or did not authorize the Kohn firm to settle on its behalf. Rather, the real issue and the threshold question is whether Petitioner is bound by the terms of the Litigation Agreement. If the Agreement does not permit Petitioner to withdraw for the limited purpose of settlement, then the issue of whether Petitioner could have withheld authority to settle from its attorney is moot. This is so because Petitioner cannot be permitted to do indirectly that which it cannot do directly, namely, avoid the majority vote provision of the Agreement.

Furthermore, *Tiernan* and *Garabedian* are not pertinent to this issue in that the cases cited therein deal specifically with enforcement of settlements. The Agreement under review here is not a settlement agreement. It is merely a contract entered into by plaintiffs setting forth the rights and obligations plaintiffs would have with respect to each other throughout the course of the entire litigation.

IV. PETITIONER OBJECTED TO THE PRESENTATION OF TESTIMONY BEFORE THE DISTRICT COURT, NEVER REQUESTED THE OPPORTUNITY TO PRESENT TESTIMONY BEFORE THE DISTRICT COURT, AND HAS WAIVED ANY CLAIM WITH REGARD TO ITS HAVING BEEN DENIED THE OPPORTUNITY TO PRESENT TESTIMONY BEFORE THE DISTRICT COURT.

The main thrust of the Petition for a Writ of Certiorari is that Petitioner was denied the opportunity to present testimony before the District Court. This is a rather specious argument inasmuch as Petitioner not only never requested the opportunity to present testimony before the District Court, but repeatedly objected to the presentation of any testimony before the District Court.

At the hearing before the Honorable Thomas M. O'Neill, Jr. on February 13, 1997, Petitioner's counsel stated:

> Number 2, you are here to review the issue de novo and will – as our opponents, co-plaintiffs, in this case – have requested – want to put on testimony, which despite our objection, Your Honor has granted and they wish to put on testimony and –
>
> Petitioner's App. 34a.

Petitioner's counsel went on to state:

> Your Honor, our objection at least as to putting on testimony, had less to do with whether it was relevant, but there was a procedure put in place that allowed them the opportunity to submit

> affidavits, as we did or to submit supplemental materials, which we did not object to. . . .
>
> Petitioner's App. 34a.

Although the Petition includes representations with regard to witnesses the Petitioner was prepared to present at the hearing on February 13, 1997 and the testimony they would offer, all of which is unsupported by the record, at no time during the hearing on February 13, 1997 did the Petitioner request of the Court the opportunity to present any testimony, nor did it advise the Court that it had witnesses who were present in the court room who were prepared to testify.[1] Moreover, in neither of the Petitioner's Memoranda filed pursuant to Judge O'Neill's directive on February 13, 1997, did the Petitioner claim that it had requested the right to present testimony or that it had been prejudiced by not being allowed to present testimony.[2] CA App. 793, 843. This issue was first raised before the Court of Appeals.

---

[1] Likewise, Petitioner makes the bald assertion on page 4 of its Petition "Accordingly, by July, 1995, a year before the first trial, it became apparent to all Plaintiffs that the provisions in the Litigation Agreement governing a group vote for purposes of settlement were no longer fair or appropriate." This is an outright misrepresentation supported nowhere in the voluminous record submitted by the Petitioner.

[2] Petitioner fails to mention that the briefing schedule also included the question of whether the Court could decide the issue before it without considering Petitioner's affidavit or the other plaintiffs' proposed rebuttal testimony. Petitioner's App. 50a.

Significantly, in Petitioner's Supplemental Memorandum of Law dated April 1, 1997, CA App. 793-825, Petitioner states:

> Further, by letters dated January 31, 1997 and February 6, 1997, counsel for the other eight plaintiffs has requested the opportunity to present testimony, including the testimony of Joanne Zack, Esquire, trial attorney for all plaintiffs (including ABWF). ABWF has objected to this request and believes that the other eight plaintiffs had ample opportunity to supplement the record, and chose not to, before the Magistrate Judge issued his report and recommendation on January 9, 1997. (Footnote omitted).

CA App. 822.

Further contradicting the Petitioner's spurious argument that a hearing was necessary in order to have prevented a "grave and manifest injustice", Petitioner's counsel stated at the proceedings before Magistrate Judge Tulio Jean Leomporra on December 17, 1996 that it considered the appendix which it had submitted to that Court to have been a complete record. Petitioner's App. 87a.

Even if additional testimony had been germane to the issues before the Court, which it was not, Petitioner waived any right it had to present such testimony by objecting to the presentation of testimony when requested by the other eight plaintiffs, by failing to request of the District Court that it have an opportunity to present such testimony and by failing to preserve that issue before the District Court.

Petitioner argues that there were at least seven issues of material fact which should have been resolved at a hearing. However, to the extent that those issues were material, which both Courts below deemed were not, they were in fact considered by the Courts below on the basis of Petitioner's uncontroverted voluminous appendix of exhibits, found at CA App. 197-537. Based upon Petitioner's representation that it had submitted a complete record and there was no need for any testimony to be presented, Petitioner had a full opportunity of having its evidence, to the extent relevant, considered by the Courts below.

The Courts below properly concluded that there was no genuine issue of material fact since it was clear, even considering the uncontradicted evidence, that the Petitioner, still being a litigant, was bound by the Litigation Agreement and bound by the vote to accept the settlement which it acknowledged took place on September 24, 1996.

V. THE JUDGMENT OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ITS PRIOR DECISIONS OR THOSE OF OTHER CIRCUITS.

The judgment of the Court of Appeals does not conflict with the law of the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and DC Circuits. Those Courts, as has the Third Circuit, have all held that the summary enforcement of a Settlement Agreement by a district court is inappropriate when there are genuine issues of material fact. However, the District Court below found that in this

case there were no genuine issues of material fact. It stated:

> Under the unambiguous language of the Agreement, as long as ABWF remains a litigant, which it does to this day, it is bound by the terms of the Agreement including the provisions that bind it to the results of the majority vote on a group settlement proposal. FN7. Because the Agreement does not permit ABWF to withdraw from the group settlement vote while remaining a litigant, I need not consider the extrinsic evidence which ABWF contends demonstrates its intent to do so or the evidence proffered to refute ABWF's extrinsic evidence. FN8.
>
> - - - - -
>
> FN7. This Court must enforce the terms of the agreement as written and must not substitute its own judgment as to the terms that would yield the most equitable result. See *Steuart v. McChesney*, 444 A.2d 659, 663 (Pa. 1982).
>
> FN8. The exhibits offered by ABWF, even if considered, reveal only ABWF's unilateral attempts to withdraw from a binding group settlement vote while remaining in the litigation and to revoke the committee's counsel's authority to negotiate on behalf of the full committee. The unambiguous language of the agreement forecloses such actions. The exhibits do not reveal any other party's acquiescence in ABWF's position but reveal only that the committee continued to seek ABWF's involvement in group settlement efforts without prejudice either to ABWF's position or to the other plaintiffs' rights under the Agreement. *See* Ex. 2Q.
>
> Petitioner's App. 26a-27a.

Clearly, the District Court did not summarily enforce a Settlement Agreement where there were genuine issues of material fact. Furthermore, none of the evidence submitted by the Petitioner was contradicted by any affidavit or evidence presented by the other eight plaintiffs. The only evidence presented by the other eight plaintiffs was one letter authored by Petitioner's counsel. There were, therefore, no disputed issues, genuine or otherwise, of material fact.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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